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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 658

LAMBIRIS SKIRIOTES,
Appellant,

vs.

THE STATE OF FLORIDA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

REPLY BRIEF OF APPELLANT.

W. B. DICKENSON, SR.,
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INDEX.

Subject Index.

	Page
Point 1	1
Point 2	2
Argued together	2
Point 3	4
Argument	4
Point 4	6
Argument	6
Reply to oral argument of Attorney General	7

Table of Cases Cited.

Abbey Dodgé, The, 223 U. S. 166	9
Andrew J. Coffee v. *James M. Groover, et al.*, 123 U. S. 1, 31 L. Ed. 51	3
Arkansas Natural Gas Co. v. *Arkansas R. Commission*, 261 U. S. 379, 384, 67 L. Ed. 705, 710, 43 Sup. Ct. 387	11
Bayside Fish Flour Co. v. *J. Dale Gentry et al.*, 297 U. S. 422-430, 80 L. Ed. 772	11
Poole v. *Fleeger*, 36 U. S. 184	4
Shibuya Jugiro v. *Brush*, 140 U. S. 291, 11 Sup. Ct. Rep. 770	4
State v. *Vanella*, 106 Pac. 364, 40 Mont. 326	2
State v. *Mannion*, 57 Pac. 542, 19 Utah 505	2
United States v. *Edward T. Gale, et al.*, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857	2

Statutes.

Florida:	
Chapter 8087, Compiled General Laws of Florida	7

United States:

Page

5 Stats. 743, Section 5 ..... 5, 7
14 Stats. 428, Section 5 6
15 Stats. 2, Section 5 6
15 Stats. 73 7
38 Stats. 692 9
U. S. Code, 16 Section 781 9

Constitution of Florida:

Constitution of 1868 2
Constitution of 1885 2

Constitution of the United States:

Fourteenth Amendment 3

TREATIES OF THE UNITED STATES.

Treaty of Amity, Settlement and Limits Between the United States and Spain 5

DIGEST AND TEXT.

12 C. J. 774, paragraph 203 2

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To the Honorable Justices of the Said Court:

We have not yet received a copy of a printed brief which the Attorney General of the State of Florida advised us he would have printed; not knowing whether he has done this we think it inadvisable to longer wait before filing a reply brief to the typewritten brief furnished to us by him.

In his summary of the argument, the Attorney General submits for the consideration of the Court

"Point 1.

A citizen of Florida cannot question the boundaries of the State as defined by the Constitution of the State."

"Point 2.

Acquiescence by its citizens and by the Federal government in the boundaries of Florida as defined by the Constitutions of 1868 and 1885 estop such parties from questioning the boundaries."

We see no reason for taking these questions up separately because they both raise the question of estoppel.

We submit to the Court that under the facts of this case there can be no estoppel of the right of the appellant to challenge the validity of the boundaries of the State of Florida as fixed by the Constitution of Florida of 1885; especially is this true where, as shown by the record in this case the appellant from inception of his prosecution raised and insisted upon all of his constitutional rights under the Constitution of the United States.

Twelfth *C. J.* page 774, paragraph 203, it is said:

"Those rights guaranteed to accused persons by the Constitution in which the State as well as the accused person is interested may not be waived by the accused, and therefore submission by him to proceedings under statutes and derogation of these rights does not estop him to deny the validity of such statutes."

Citing 106 Pa. 364, 40 Mont. 326, *State* v. *Vanella*, also 57 P. 542, 19 Utah 505, *State* v. *Mannion*.

We are also aware of the fact that the citation from 12 *C. J.* above quoted goes on to say

"But those constitutional guaranties which are in the nature of personal privileges of the accused may be waived *by him*, and therefore he may not question the constitutionality of the statute under which he has made such a waiver."

Citing, 109 U. S. 65, 3 S. Ct. 1, 27 L. Ed. 857.

We submit, however, in this case that the appellant as shown by the record was guilty of no conduct or act on his

part which could be construed to be a waiver of his constitutional right.

In the case decided by this Court above quoted from the court held:

> "Pleading in bar to an indictment also held to be a waiver of the right to object to the constitutionality of a law by which the Grand Jury was made up."

In this case the appellant raised the question of and asserted all of his constitutional rights before pleading to the indictment at all.

We call the court's attention to the case of *Andrew J. Coffee, plaintiff in error* v. *James M. Groover, et al.*, 123 U. S. 1, 31 L. Ed. 51, which case originated in Florida and involved the title to certain lands lying in a strip of territory claimed by the State of Florida and also claimed by the State of Georgia in which this Court said in the 3rd head note:

> "A boundary between Georgia and Florida was long in dispute Georgia claiming to a line called Watson's line, and exercising political jurisdiction, and making grants of land to that line; whilst Florida claimed to a line called McNeil's; further north than Watson's. Upon running the true line, as finally agreed upon by the two states, it was found to be further north than McNeil's line: HELD (1) That the grant made by Georgia of the land in dispute, which was south of McNeil's line though made whilst Georgia exercised the powers of government de facto over the territory there, was nevertheless void: (2) That the confirmation by Florida of the grants made by Georgia, would not invalidate or disturb the grant of the land in dispute previously made by itself."

It is also well known that for more than sixty years after the adoption of the 14th Amendment to the Constitution of the United States and notwithstanding the constitutional

rights therein guaranteed the thirteen Southern states each having embraced in their own constitution the provisions of the 14th Amendment of the Constitution of the United States indulged in a systematic and continuous practice of excluding from citizens of African decent or the Negro race the right to jury service in all of the said Southern states but notwithstanding this long failure to assert this Constitutional right this Court in

Shibuya Jugiro v. *Brush;*
Re: Shibuya Jugiro, 140 U. S. 291, 11 Sup. Ct. Rep. 770
held.

> "It rests with each state to prescribe such qualifications as it deems proper for jurymen taking care only that no discrimination in this respect as to such service be made against any class of citizens solely because of their race."

This adjudication by this Court has been followed in a number of cases subsequent.

The Attorney General also says:

> "Point 3.
>
> The establishment of a state boundary is a political rather than a juridical question and once established and recognized by the political departments of the State and nation the boundaries cannot be questioned by the judicial department."

We submit to the court that in the case cited by the Attorney General, *Poole* v. *Fleeger,* 36 U. S. 184, is the paragraph copied from the opinion showing that this was a boundary dispute between two States lying between the States of Tennessee and Kentucky. A part of the quotation which he includes in his brief from that opinion says:

> "It cannot be doubted that it is a part of the general right of sovereignty, belonging to independent

> nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries, so established and fixed by compact by the nations, become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated, to all intents and purposes, as the real and true boundaries. This is the doctrine universally recognized in the law and practice of nations."

In the case at bar no such situation exists and no question between the States; if the Court accepts this holding of this Court quoted above as the law, which we accept as the law, then the political authority of the United States has settled the question adversely to the contention of the State Attorney General because the United States government long since fixed the boundaries and have adhered to the boundaries as fixed since 1794. See our original brief pages 24-32, inclusive.

There are many other treaties of the United States to the same effect. We also call the Court's attention to our original brief pages 33-37, inclusive, showing and setting forth the diplomatic correspondence of the United States wherein it is shown by the Transcript of Record, pages 49-51, inclusive, that the United States has consistently insisted upon the boundaries as fixed at three nautical miles or one marine league from shore.

By reference to 5 Stats. 743, Section 5, the Court will see that under this act of Congress of March 3, 1845, admitting Florida into the Union provided:

> "That said State of Florida shall embrace the territories of East and West Florida, which by the Treaty of Amity, Settlement and Limits between the United States and Spain, on the 22nd day of February 1819 was ceded to the United States."

Thus it will be seen by reference to the treaty referred to that Spain ceded to the United States only the up lands of

the territories of East and West Florida together with the adjacent islands. This fixed the boundaries of the State both by treaty and by act of Congress.

"Point 4.

"The judiciary will recognize the action of the political department of the government as expressed by the Congress of the United States in the approving of the Florida Constitution of 1868 which defined the boundaries of the State in words repeated in the Florida Constitution of 1885."

We submit to the Court that this statement assumes a fact which is not existing in that the Attorney General asserts that the Congress of the United States "approved" the Constitution of the State of Florida whereas such is a fact which is non-existing.

By reference to 14 Stats. 428, Section 5, Act of Congress of March 2, 1867, it was provided:

"When such Constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors or delegates, and when such Constitution shall be ratified by a majority of persons voting on the question of ratification who are qualified electors of delegates, and when such Constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same, and when said state by a vote of its Legislature * * * shall have adopted the amendment to the Constitution of the United States, proposed by the 39th Congress, and known as Article 14 * * * then such state shall be entitled to representation in Congress."

By reference to 15 Stats. 2, Section 5, the Court will find that the Congress of the United States on March 23, 1867, adopted another act amending 14 Stats. 428, but having no relation to the questions here.

By reference to 15 Stats. 73 the Court will see that the Congress of the United States on June 25, 1868, adopted this statute providing:

> "Whereas * * * Florida in compliance with the Act of March 2, 1867 and amendments thereto, framed the Constitution of state government which is republican. * * *
>
> "Be it enacted * * * that each of the states of * * * and Florida, shall be entitled and admitted to representation in Congress when the Legislature shall have ratified the 14th amendment to the United States Constitution."

It is therefore apparent that the Congress of the United States did not ratify the Constitution of the State of Florida except in respect to the adoption and inclusion therein of the 14th amendment.

The Congress of the United States by 5 Stats. 743, Sec. 5, *supra*, having fixed the boundaries of the United States and not having expressly changed the boundaries of the United States could not indirectly and without any apparent intention so to do repeal the former act.

We therefore submit to the Court that there is no merit in this contention.

The Attorney General in his oral argument has something to say about the right of the State of Florida to pass such acts as might be necessary for the regulation and conservation of the sponge fishing industry.

By reference to Chapter 8087, Compiled General Laws of Florida, copied in full in appellant's original brief at pages 14 and 15, the Court will see that this statute is not a regulatory statute but is a statute absolutely prohibiting the taking of sponges "from the Gulf of Mexico, or the Straits of Florida or other waters within the territorial limits of the State of Florida", therefore, the act prohibits the taking of sponge from the entire Gulf territory, also from the

entire territory covered by the Straits of Florida, also from other waters within the territorial limits of the State of Florida which might include also the Atlantic Ocean. This act is especially reprehensible in that it is in conflict with the 14th amendment of the Constitution in that it denies to a certain class of persons the right to fish at all in the Gulf of Mexico and also denies the right to that same class of persons to fish at any point in the Straits of Florida, also denies the right to fish at any point in waters within the territorial limits of the State of Florida at the same time granting to another class of persons full privileges to do the same fishing at any point in the same territory.

There are two classes of persons who take sponge from the Gulf of Mexico. One class is commonly called "hookers" because they stand in the bow of a rowboat with a thirty-foot cypress pole on one end of which are three iron hooks. They look through a glass bottom bucket to break the surface of the water and as another paddles the boat along when the man in the bow sees a sponge in the bottom he hooks it from the bottom with a long pole, hence he is called a hooker, and there are very few of these men and they cannot operate in water deeper than about twenty feet; by reference to the Government maps of the Gulf of Mexico and coastal regions off of Florida it will appear that a large percentage of the territory in which sponge is grown is deeper than these spongers can operate.

There is another class of spongers, known as deep sea divers and operate in any depth of water up to 200 feet by the use of diving apparatus they go down on the bottom and cut the sponge loose from moorings and send them up to the top in a mesh bag.

The first group above named fish without violation of the law and the other group are absolutely prohibited and deprived of that right by the operation of this law.

The Congress of the United States by 38 Stats. 692, carried forward in U. S. Code, Title 16, Section 781, original act adopted August 15, 1914, provided:

> "It shall be unlawful to catch or take from waters of the Gulf of Mexico or the Straits of Florida, outside of state territorial limits any commercial sponges, when wet less than five inches in their maximum diameter."

This act presents this question for the consideration of this Court: Under the Congressional act quoted, what constitutes the territorial waters of the State of Florida? To this question there can be but one answer and that is the waters lying parallel with the West boundary of the State of Florida and islands adjacent thereto and within three miles of the up land, all waters lying beyond that limit in the Gulf of Mexico was intended and is covered by the Act of Congress which permits the taking from any waters within the jurisdiction of Congress, sponges of greater maximum diameter than five inches.

It is evident that a citizen of the United States may fish six miles out where the appellant was fishing and, under the Act of Congress, take sponge from the Gulf of Mexico.

It is equally evident under the means, manner and method of enforcement of the Act of the Legislature of Florida, *supra,* the same man might be subject to arrest, fine and imprisonment or both; hence the conflict with the Federal Legislative Act.

This Court in the case of *The Abbey Dodge,* 223 U. S. 166, construed this Act.

The facts were The Abbey Dodge landed at Tarpon Springs with 1,229 bunches of sponge, were seized and the questions raised were:

(1) The Act deals with a matter exclusively within the jurisdiction of the State.

(2) The statutes regulate the subject not within the national grasp and hence not embraced within the power of Congress.

This Court said that the first question assumes that the Act regulates sponge within the territorial waters of the State.

The second question asserts that if limited to the bed of the ocean beyond the territorial limits of the State the national government has no power to deal with it. This the Court further said

> "While it is true that it would be possible to interpret the statute as applying to sponge taken in local waters, it is equally certain that it is susceptible of being confined to sponges taken outside of such waters.
>
> In view of the clear distinction between state and national power on the subject, long settled at the time the act was passed and the rule of construction just stated, we are of the opinion that its provisions must be construed as applicable to the subject within the authority of Congress to regulate."

"The second proposition denying to Congress the power to regulate the landing of sponges taken out side the territorial jurisdiction of a State. For the sake of brevity we do not stop to review the general question this proposition involves to demonstrate its inaccuracy, or to point out its conflict with the law of nations and its inconsistency with the practice of government from the beginning; although it would concede The Abbey Dodge was gathering sponge in the waters, which by the law of nations should be regarded as common property of all, and transporting them to the United States she was then within the power of Congress to regulate." It is therefore apparent that the Congress of the United States has assumed to control the taking of commercial sponge from the Gulf of Mexico beyond the one marine league or three nautical mile limit and the Congress

of the United States having legislated on the subject we submit to the Court that the State of Florida can not legislate on the same subject covering any greater territory than the waters bordering on the State and within one marine league from the mainland.

We call the Court's attention to *Bayside Fish Flour Company, Appellants* v. *J. Dale Gentry, Earl B. Gilmore, I. Zellerbach, et al.*, 297 U. S. 422-430, 80 L. Ed. 772.

This case was dealing with the sardine fisheries on the coast of California.

This Court in its opinion said:

> "Sardine are allowed to be taken for use in a reduction plant or by a packer only in accordance with certain provisions set forth. By paragraph 1068 the State Fish and Game Commission is authorized to grant a revocable permit subject to such restrictions, rules and regulations as the Commission may prescribe, to take and use fish by a reduction or extraction process. No reduction of fish may be permitted which may tend to deplete the species, or result in waste or deteriation of fish."

This California law permitted the packers of sardines to ply their trade free of any prohibition of the law. This Court said in discussing this question of class legislation:

> "A particular classification is not invalidated by the 14th amendment merely because inequality actually result. Every classification of persons or things have regulation but must produce inequality in some degree: but the law is not thereby rendered invalid, unless the inequality produced be actualy and palpably unreasonable and arbitrary."
>
> Citing *Arkansas Natural Gas Co.* v. *Arkansas R. Commission*, 261 U. S. 379, 384, 67 L. Ed. 705, 710, 43 S. Ct. 387.

The differences between the sardine case and the case at Bar is that this Court said that the California law under

question constituted a reasonable regulation although working some inequality. In the present case there is an absolute prohibition of one class of citizens while the other class is left free to pursue their avocation in the same identical line.

For the reasons stated herein as well as in our main brief we submit to the Court that the boundaries as attempted to be fixed by the Constitution of Florida are invalid and that the criminal jurisdiction of the criminal courts of the State of Florida are limited to the jurisdiction of a strip of the sea not exceeding one marine league from mean low tide from the shoreline of the State.

Respectfully submitted,

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